Nos. 17-1717 and 18-18

In The Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND OTHER ORTHODOX JEWISH ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a governmental war memorial in the shape of a 32-foot-high Latin cross violates the Establishment Clause of the First Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for the past half century. COLPA's first *amicus* brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 *amicus* briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

•Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

•Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Petitioners and respondents have filed blanket consents to the filing of *amicus* briefs.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

SUMMARY OF ARGUMENT

The cross has, over many centuries, been a symbol that may be emblematic of hostility to, and persecution of, Jews. But a distinction is clearly drawn in Jewish law and tradition between the cross as a religious object and its use for secular commemorations and awards. This difference parallels the rationale expressed by Justices of this Court in cases involving governmental displays that have been challenged as violating the Establishment Clause. We review in this brief the frequent rabbinic rulings that demonstrate the distinction that, in our view, should control disposition of this case.

ARGUMENT

The Latin cross has not, to put it mildly, been a beloved symbol for Jews over the past 17 centuries. It has been the emblem for much persecution and devastation committed against Jewish communities in Europe and Asia during the crusades and other times and places where and when anti-Semitism flourished.

The *Jewish Encyclopedia* published in 1906 (volume IV, pages 368-369) noted that "being a Christian symbol, [the cross] has always been scrupulously avoided by Jews," and that "[t]he Jewish aversion to using any sign resembling a cross was so strong that in books on arithmetic or algebra written by Jews the plus sign was represented by an inverted 'kamez.'"[2]

It may, therefore, appear anomalous that Orthodox Jews today could support the continued government maintenance of a huge Latin cross in Bladensburg on a highway that connects Washington to Annapolis. But we fully endorse the distinction that has been made in many decisions of this Court and that is discussed in the Briefs of the Petitioners in this case – *i.e.*, that a cross built and maintained with public funds for "secular commemoration" differs, for constitutional purposes, from a cross that is designed to convey religious endorsement or a religious message.

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[2] The "kamez" is a Hebrew vowel shaped like a capital T. Hebrew vowel signs appear under consonant letters.

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), this Court upheld the constitutionality of a municipality's display of a Chanukah menorah – which it recognized as a religious symbol four times in Justice Blackmun's plurality opinion – because the complete holiday display was not an endorsement of religion but was, instead, "a recognition of cultural diversity." 492 U.S. at 619. That principle governs this case and warrants reversal of the decision of the Fourth Circuit.

We are filing this brief not to belabor this point. The constitutional distinction is fully covered in the briefs of the petitioners, and it will, no doubt, be amply discussed in other *amicus curiae* briefs. In an effort to bring to the Court's attention "relevant matter not already brought to its attention by the parties" (Supreme Court Rules 37(1)), we summarize in this *amicus* brief a history of Jewish attitude to the cross that is not commonly known or appreciated.

HALACHA (JEWISH RELIGIOUS LAW) DISTINGUISHED BETWEEN CROSSES CONVEYING RELIGIOUS ENDORSEMENT AND CROSSES THAT ARE SECULARLY CEREMONIAL

(1) The Thirteenth and Fourteenth Centuries

(a) Rabbi Mordechai ben Hillel, born in Germany around 1240, was the author of a landmark compendium of Jewish religious law that became known simply as "Mordechai" by later Talmudists. He was murdered, together with his wife and five

children, in 1298 in Nuremberg in the "Rindfleisch Massacres" – a series of brutal destructions of entire Jewish communities initiated because of a blood libel that charged Jews with having desecrated a sacramental wafer. 4 Graetz, History of the Jews 35-36 (1949).

In his commentary on Talmudic tractate *Avoda Zara* (Ch. 3), Rabbi Mordechai distinguished between a cross worn by Christian clergy as an ornament and a cross that accompanies religious worship. Whereas the latter is a symbol of a forbidden faith that may not be utilized, the former is not.

(b) Rabbi Yom Tov Ibn Ashvili (1260-1328), known as the "Ritva," wrote in his commentary on *Avoda Zara* 42b that coins bearing a cross symbol are permitted for use notwithstanding the fact that crosses used for religious sacrament are forbidden.

(c) Rabbi Menahem ben Solomon Meiri (1249-1316), a Talmudic scholar of Provence, France, wrote a comprehensive commentary on the Talmud that was not published in full until the Twentieth Century. His comment in *Beit Ha-Bechira* on *Avoda Zara* 42b declares that a cross utilized for ornamental, and not religious, purposes is permissible.

(2) The Sixteenth Century

Rabbi Moshe Isserles (1530-1572), known as the "Rema," was born and lived in Cracow, Poland. He was the foremost authority of Ashkenazic Jewry in

his time. He wrote notes to the *Shulchan Aruch* [Code of Jewish Law] that became the authoritative guide for religious observance in the Ashkenazic Jewish communities.

The Rema's note to Section 141(1) of *Shulchan Aruch Yoreh Deah* cites the ruling of Rabbi Mordechai and declares that there is a difference in Halacha between a cross used for religious worship and an ornamental cross worn as a necklace.

(3) The Nineteenth Century

Rabbi Yosef Shaul Nathanson (1810-1875) was appointed Chief Rabbi of Lemberg (Lvov), Poland, in 1857. The *Encyclopedia Judaica* (vol. 15, p. 18, 2d ed. 2007) describes Rabbi Nathanson as "the outstanding *posek* [halachic decisor] and writer of responsa of his generation."

In his collected responsa titled *Shoel U-Meishiv*, vol. 3, no. 71, Rabbi Nathanson ruled that a distinguished Jew awarded a royal medal in the shape of a cross for service to the crown could wear the medal.

(4) The Twentieth Century

Rabbi Ovadiah Yosef (1920-2013) was the Sephardi Chief Rabbi of Israel from 1972 to 1983. He published many volumes of responsa under the titles *Yabia Omer* and *Yechave Daat*. Vol. 3, No. 65 of *Yechave Daat* comprehensively reviewed the subject of honorary awards in the form of a cross given by a government for exceptional service. Rabbi Yosef

ruled that wearing such an award is permissible because it is not used for a religious service.

Rabbi Yosef concluded his responsum with the observation that Rabbi Jacob Meir (1856-1939), who was appointed in 1921 as the first Sephardi Chief Rabbi of Palestine, was photographed wearing a royal medal given him in the form of a cross, and that he frequently wore such a medal at royal audiences. ***Encyclopedia Judaica*** (vol. 13, p. 779, 2d ed. 2007) reports that Rabbi Meir was decorated by the kings of Greece and England and was awarded the French Legion of Honor.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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